

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

February 7, 2003 Session

IN RE: T.K.Y.

**Appeal from the Juvenile Court of Coffee County, Manchester, Tennessee
No. 368-99J Timothy R. Brock, Juvenile Judge**

M2002-00815-COA-R3-JV - Filed April 2, 2003

This case is an appeal of right by T.C.P., III ("Mr. P.") from an Order of the Coffee County Juvenile Court terminating his parental rights to T.K.Y., born October 3, 1997. The sole basis of the termination of Mr. P.'s parental rights was his failure to file a petition to establish paternity within thirty (30) days after he had notice that he was, or could be, the father of the child. T.C.A. §36-1-113(g)(9)(A)(vi). Based on the Supreme Court's decision in *Jones v. Garrett*, 92 S.W.3d 835 (Tenn. 2002), decided on December 30, 2002 after the decision of the trial court, we must reverse the decision of the Juvenile Court and remand the case for further proceedings in accordance with this Opinion.

**Tenn.R.App.P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed;
Cause Remanded to the Juvenile Court for Coffee County**

W. FRANK BROWN, III, Sp. J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J. and PATRICIA J. COTTRELL, J., joined.

Randall W. Morrison, Tullahoma, Tennessee, and Eric J. Burch, Manchester, Tennessee, for the Appellant T.C.P., III

J. Stanley Rogers and Christina Henley Duncan, Manchester, Tennessee, for the Appellees D.Y. and K.Y.

Paul G. Summers, Attorney General and Reporter, and Douglas Earl Dimond for the Appellee State of Tennessee

OPINION

I. THE LEGAL ISSUES

There are several issues presented in this appeal. First, did the trial court err in deciding the termination of parental rights issue before determining the paternity issue? Second, did the

trial court err in failing to terminate Mr. P.'s paternal rights on other grounds? Third, should this court consider the constitutional attack on T.C.A. §36-1-113(g)(9)(A)(vi)?

II. STANDARD OF REVIEW

The applicable standard of review is also set forth in *Jones*. Justice Holder wrote:

Appellate review of non-jury cases is de novo upon the record, accompanied by a presumption of correctness, unless the evidence preponderates against the trial court's factual findings. *See* Tenn. R.App. P. 13(d). A parent's rights may not be terminated unless a court finds that one or more of the statutorily defined grounds for termination has been established by clear and convincing evidence. *See* Tenn.Code Ann. §36-1-113(c)(1) (1996 & Supp.1999). We must, therefore, apply this heightened standard to our review of the trial court's factual findings. Conclusions of law, however, are reviewed under a pure de novo standard, according no deference to the conclusions of law made by the lower courts. *See Bank/First Citizens Bank v. Citizens & Assocs.*, 82 S.W.3d 259, 262 (Tenn.2002).

Id. at 838.

III. FACTUAL DISCUSSION

Mr. P. is a self-employed haircutter. He works and lives in Shelbyville, Bedford County, Tennessee. In November of 1996 Mr. P. and K.Y. ("Mrs. Y.") began having an affair. Mrs. Y. was (and still is) married to D.Y. ("Mr. Y."). Mr. and Mrs. Y. live in Coffee County, Tennessee. Although Mr. and Mrs. Y. have been married since 1988, Mr. P. was the fifth man with whom Mrs. Y. had sexual relations.

In late January of 1997 Mrs. Y. discovered she was pregnant. She told Mr. P. of her condition and opinion that he was the father. The child was born on October 3, 1997. Because Mr. Y. had been having sexual relations with his wife and had no knowledge of her relationship with Mr. P., Mr. Y. naturally thought the child was his biological child. Mrs. Y. reinforced that belief.

The P.-Y. affair continued after T.K.Y.'s birth. The parties discussed Mrs. Y.'s divorcing her husband in order that a P.-Y. marriage could occur. Indeed Mr. P. was married when the affair with Mrs. Y. began. The P.s had married on September 8, 1995. Mrs. P. had filed a complaint for divorce on April 30, 1997. Mr. P.'s marriage was dissolved on May 15, 1998 in the Chancery Court for Bedford County on the basis of irreconcilable differences. No children were born to the P.s.

Mr. P. would see T.K.Y. when he saw Mrs. Y. However, because of Mr. Y. and his continuing relationship with his wife, Mr. P. did not have any set parenting time with T.K.Y. Likewise, Mrs. Y. did not want to receive money from Mr. P. because she feared that the

relationship would be exposed. The situation came to a head in July of 1999. Mr. P. spent the night with Mrs. Y. at her home on July 2 while Mr. Y. was out of town. Mr. P. was very frustrated that Mrs. Y. had not done anything about the divorce. He told her that he intended to pursue his legal rights regarding T.KY. Thereafter, Mrs. Y. told her husband the truth about the child's paternity on July 7, 1999.

On August 23, 1999 Mr. P. filed a Petition for Legitimation/Petition for Custody/Petition for Visitation/Petition to Set Child Support with the Juvenile Court for Coffee County, Tennessee. On September 29, 1999 Mr. and Mrs. Y. answered the Petition and filed a Counter-Petition to Terminate Mr. P.'s parental rights. Mr. Y. was going to file for adoption after the termination case was concluded. The Putative Father response revealed Mr. P. to be the father of the child. An agreed Order has been in effect since December 12, 2000 which has prevented Mr. P. from having contact with the child. The parties were also mutually enjoined from contacting the other party.

The case was tried on March 4 and 5, 2002. The Juvenile Court did not consider the Petition for Legitimation. Instead the trial judge decided the termination issue. The trial court terminated Mr. P.'s parental rights due to his failure to file a petition for paternity within thirty (30) days of having notice that he may be the father. T.C.A. §36-1-113(g)(9)(A)(vi). The trial judge decided that the Y.s had failed to prove any other grounds upon which to terminate Mr. P.'s parental rights.

The trial judge then went to the second issue and found that it was in the child's best interests that Mr. P.'s parental rights be terminated. In supporting his decision on the "best interest determination" the trial judge mentioned some reasons, such as the lack of consistent visitation and financial support as part of his rationale. A Final Judgment and Termination of Parental Rights was filed on March 13, 2002. Mr. P. timely filed his notice of appeal.

IV. LEGAL ANALYSIS

A. The Order of Hearing Issues.

The trial court explained that he preferred to decide the issue of termination first. If Mr. P.'s parental rights were terminated, then it would not be necessary to decide the paternity issue. This decision, in retrospect, fatally flawed the trial and resulting holding.

On December 30, 2002 Justice Holder released her opinion in *Jones v. Garrett, supra*. That decision is a unanimous decision of the five (5) sitting justices of our Tennessee Supreme Court. *Jones* is very similar in the legal issues presented. Factually, Mr. Garrett was the father of a child born out of wedlock to Ms. Penland, who was single. She surrendered her parental rights and placed the child for adoption with James and Stephanie Jones.

On February 13, 1998 the Jones filed a Petition to adopt the Penland baby. On April 9, 1998 the Jones amended their petition to name Mr. Garrett as a party. The Jones alleged that Mr. Garrett was the biological father and sought to terminate his rights due to abandonment. Later, Mr. Garrett filed a separate Petition to Establish Parentage. On February 5, 1999 an Order was entered declaring Mr. Garrett to be the biological and legal father of the Penland baby.

After a termination hearing in June of 1999, the trial court terminated Mr. Garrett's parental rights on August 13, 1999 on the basis that he had failed to file his petition to establish parentage within thirty (30) days after being notified that he may be the father of the child. The trial court did not rule on the abandonment issues or the issue of whether the termination of Mr. Garrett's parental rights was in the child's best interest. An appeal followed. The Court of Appeals affirmed but the Supreme Court reversed.

Justice Holder pointed to T.C.A. §36-1-117(b), which "[s]hows a clear preference for determining paternity prior to considering a petition to terminate a father's parental rights pursuant to Tennessee Code Annotated section 36-1-113." [Emphasis added]. 92 S.W.3d at 839. Justice Holder said that the trial court must determine the paternity issue before determining the termination issue. T.C.A. §36-1-117(b)(2) provides:

The paternity petition shall be heard and concluded prior to any action by the adoption court to determine whether to grant the petition for adoption.

Thus, as Justice Holder wrote:

A father who establishes paternity prior to a termination proceeding should be permitted to enjoy the benefit of having established paternity. One such benefit is to be exempt from the additional grounds for terminating parental rights under Tennessee Code Annotated section 36-1-113(8)(A) [now codified as (9)(A)]. After a father has been granted an adjudication of paternity, it is incongruous to terminate his parental rights because he failed to timely file a petition to establish paternity.

Id. at 840.

Justice Holder pointed out that the statutory provision in question in both cases did not apply to legal parents and guardians. Thus, based upon the stipulation that DNA tests would prove that Mr. P. is the biological father of T.K.Y., the trial court terminated Mr. P.'s rights on a ground that would not have been available if the paternity issue had been tried first. Mrs. Y., Mr. P. and T.K.Y. had an appropriate DNA test conducted on August 2, 1999. The test results indicated Mr. P. had a 99.95% chance of being the father of T.K.Y. Trial Exhibit 1 is the Paternity Results submitted by Genetic Assays, Inc. of Nashville.

B. Termination of Other Grounds.

On appeal the Mr. and Mrs. Y. contend that the trial court erred by not terminating Mr. P.'s parental rights due to his failure to pay pre-natal expenses for the child, to visit the child or pay support for the child, *i.e.* abandonment. We note, however, that the prenatal expense ground is found under subsection (9)(A)(i) and thus this ground is not available against a legal parent.

The trial court specifically found that Mr. P. had not abandoned his son. The trial court has to find grounds for termination by clear and convincing evidence. Here, the remaining ground was that the child had been abandoned as defined by law. T.C.A. §36-1-113(c)(1).

Further, under *Tennessee Baptist Children's Homes, Inc. v. Swanson*, 2 S.W.3d 180 (Tenn. 1999), the Supreme Court held that abandonment, as defined by the legislature, was unconstitutional. 2 S.W.3d at 188. Therefore, it is necessary to prove that the parent "willfully" failed to support and/or visit the child. The court has reviewed the transcript to determine if the appellees are correct in their contention that the trial judge erred in not terminating Mr. P.'s parental rights on either abandonment theory. After reviewing the record, and keeping in mind that the higher proof requirement and other requirements to terminate parental rights, we agree with the trial court that the Y.s failed to meet their burden of proof on the issues of abandonment under the facts of this case. The trial judge was in the best position to determine the credibility of the parties. The proof was divergent on several issues. Indeed, Mrs. Y.'s oral testimony was different from some of the documentary evidence she authored.

C. The Constitutionality Argument.

Mr. P. raised on appeal the issue that T.C.A. §36-1-113(g)(9)(A)(vi) was unconstitutional as applied. The issue was not raised at trial. Therefore, the Attorney General and Reporter did not participate in the trial of the cause.

Because of the general rule of law that such issues cannot be raised for the first time on appeal and the subsequent construction of this statute in *Jones*, this court will not consider this issue. *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983) and *Trew v. Haggard*, 2002 WL1723686 (Tenn.Ct.App. 2002) at *7. It also appears that the doctrine of mootness is applicable under the Supreme Court's decision in *Jones*.

V. CONCLUSION

This is a tough case for all parties from a factual viewpoint. It is good that the Mr. and Mrs. Y. have reconciled, especially in view of the birth of their daughter, C.Y., who was born on March 20, 1999. DNA tests proved that Mr. Y. was C.Y.'s biological father. Counsel for the Y.s appeared to imply that Mr. P. had fewer rights because he was having an affair with a married woman. Absent rape, it usually takes two persons to have such a relationship. Mrs. Y., as a married woman, was just as wrong to have sex with a married and/or single man not her husband as it was wrong for Mr. P. to have sex with a married woman not his wife. Both share in the blame/wrongdoing. Indeed, as Mr. Y. stated in his testimony: "it takes two to tango."

In deciding this case we recognize not only the difficult, practical problems that affect the Y. family but we also recognize that we are dealing with constitutional rights. As this court has stated in *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 185 (Tenn.Ct.App. 2000), *perm. app. denied* (2001):

More recently, the courts have recognized that the biological father of a non-marital child may have parental rights commensurate with those of married parents or divorced custodial parents. The Tennessee Supreme Court has held that a biological father of a non-marital child who has developed a substantial relationship with the child has a fundamental liberty interest entitled to due process protection. *See Petrosky v. Keene*, 898

S.W.2d 726, 728 (Tenn.1995); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn.1994). This court has also held that the biological father of a non-marital child who has attempted in good faith to establish a relationship with his child has a right to attempt to create a legally recognized parent-child relationship. *See In re Hood*, 930 S.W.2d 575, 578-79 (Tenn.Ct.App.1996). As a result of these decisions, the parental rights of biological fathers of non-marital children are entitled to the same constitutional protection as the rights of married parents and divorced custodial parents, as long as the biological father has established a substantial relationship with the child.

Because of her marital relationship, it is easy to understand Mrs. Y.'s effort to keep her relationship with Mr. P. a secret from Mr. Y. However, that desire for secrecy effectively inhibited Mr. P.'s attempt to develop a substantial relationship with T.K.Y. From a practical point of view, this case is not that different from the typical post-divorce case where a child may live with a biological parent and a step-parent and the other biological parent has some parental sharing time with the child. The "problem" will be explaining the "relationships" to T.K.Y. The Y.s had made a commitment to tell T.K.Y. the truth about his parentage. Such may now occur "sooner" than "later."

For the foregoing reasons, this case is remanded to the Juvenile Court for Coffee County for an early hearing on Mr. P.'s Petition to Establish Paternity. Based on the parties' prior stipulation that Mr. P. is the biological father of T.K.Y., then the Juvenile Court shall determine issues regarding the proper, primary residential parent, shared parenting, support and other issues for T.K.Y. The costs of the appeal shall be taxed to the Y.s, the appellees.

W. FRANK BROWN, III, SPECIAL JUDGE